

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP317

STATE OF WISCONSIN

Cir. Ct. Nos. 2009TR4760
2009TR4808

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF JACKSON,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. TROKA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jackson County:
THOMAS E. LISTER, Judge. *Affirmed.*

¶1 BLANCHARD, P.J.¹ Robert Troka appeals a judgment of conviction for operating a motor vehicle while intoxicated, as a first offense, in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

violation of WIS. STAT. § 346.63(1)(a).² Troka argues that the circuit court erred in denying his motion to suppress evidence of intoxication that an officer obtained following a traffic stop. Specifically, Troka argues that the evidence of intoxication obtained by the officer after the stop should have been suppressed because the officer lacked probable cause or reasonable suspicion of a crime or offense necessary to justify the investigative stop. Troka also argues that the circuit court erred in relying on an unpublished opinion when deciding Troka's motion for reconsideration. For the reasons explained below, I affirm.

BACKGROUND

¶2 The sole witness at the suppression hearing was the sheriff's department sergeant who stopped Troka's vehicle. The sergeant testified as follows.

¶3 On a Friday at around 11:00 p.m., the sergeant saw a vehicle³ traveling on a highway in a no-passing zone. The sergeant saw Troka's vehicle flash its high beam headlights at least a half mile from the sergeant's oncoming vehicle. The sergeant knew the approximate distance because Troka's vehicle was just outside his radar's half-mile range.

¶4 When Troka's vehicle entered the sergeant's radar range, the radar measured its speed at thirty-one miles per hour, in a fifty-five-miles-per-hour

² Although notices of appeal were filed on both case numbers 2009TR4760 and 2009TR4804, it appears that the only charge under case No. 2009TR4760, operating with a PAC of .10 or more, was dismissed at the circuit court level. The parties do not make any arguments on appeal in regard to this dismissed charge and, thus, we do not address it further.

³ For the balance of this opinion, I refer to this as Troka's vehicle because there is no dispute on this point.

zone. Troka's vehicle flashed its high beam headlights a second time within approximately two hundred feet of the sergeant's oncoming vehicle. The sergeant's high beams were not on, and the sergeant did not observe any reason for Troka's vehicle to flash its high beams, such as an animal or pedestrian on or near the roadway.

¶5 After the vehicles passed each other, the sergeant turned around to follow Troka's vehicle. Troka's vehicle slowed down to twenty-five miles per hour, while still in the fifty-five-miles-per-hour zone. No other vehicles appeared to be in the area.

¶6 While following Troka's vehicle for approximately the next one-half mile, the sergeant noticed that the vehicle "just kept weaving back and forth" within its lane of traffic. The sergeant described this weaving as "real slow and methodical ... going left to right in a slow motion" and "get[ting] close to the center line" then moving back "all the way across the road."

¶7 The sergeant testified that he considered all of these factors together—the unexplained use of high beam headlights, the slow speed, and the weaving, at around 11:00 p.m. on a Friday—in determining that the driver might be impaired and deciding to initiate an investigative stop.

¶8 When the sergeant stopped the vehicle, he identified Troka as the driver. During the stop, the officer concluded that Troka was impaired, and placed him under arrest. On appeal, Troka does not challenge any police conduct following the stop of his vehicle.

¶9 Troka filed a motion to suppress the evidence of intoxication that the sergeant obtained following the stop, arguing that the sergeant lacked information

sufficient to support probable cause or reasonable suspicion to justify the stop. The circuit court denied the motion to suppress. In deciding that the stop was justified, the circuit court found in part that the sergeant “could reasonably conclude” that Troka violated WIS. STAT. § 346.59(1) or (2)⁴ by “operating at a speed so slow that it would normally impede traffic proceeding at the speed limit.”

¶10 At the suppression hearing, the parties and the court also discussed the question of whether the stop was lawful on the grounds that the sergeant observed Troka violate WIS. STAT. § 347.12(1)(a)⁵ by flashing his high beam

⁴ WISCONSIN STAT. § 346.59 provides in part:

(1) No person shall drive a motor vehicle at a speed so slow as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or is necessary to comply with the law.

(2) The operator of a vehicle moving at a speed so slow as to impede the normal and reasonable movement of traffic shall, if practicable, yield the roadway to an overtaking vehicle whenever the operator of the overtaking vehicle gives audible warning with a warning device, and shall move at a reasonably increased speed or yield the roadway to overtaking vehicles when directed to do so by a traffic officer.

⁵ WISCONSIN STAT. § 347.12 provides:

(1) Whenever a motor vehicle is being operated on a highway during hours of darkness, the operator shall use a distribution of light or composite beam directed high enough and of sufficient intensity to reveal a person or vehicle at a safe distance in advance of the vehicle, subject to the following requirements and limitations:

(a) Whenever the operator of a vehicle equipped with multiple-beam headlamps approaches an oncoming vehicle within 500 feet, the operator shall dim, depress or tilt the vehicle’s headlights so that the glaring rays are not directed into the eyes of the operator of the other vehicle. This paragraph does not prohibit an operator from intermittently flashing the vehicle’s high-beam headlamps at an oncoming vehicle whose high-beam headlamps are lit.

headlights within 500 feet of an oncoming vehicle whose high beams were not activated. However, it is not clear from the transcript of the suppression hearing whether the court explicitly intended to make any findings in this regard, or relied on this as a grounds at that time to deny the suppression motion.

¶11 Troka filed a motion for reconsideration, arguing that the circuit court erroneously interpreted the facts before it and the law regarding whether Troka had violated traffic ordinances by driving under the speed limit or flashing his high beams. The circuit court denied Troka’s motion for reconsideration. The court’s statements in the course of addressing the motion may be reasonably construed to constitute findings that Troka’s slow speed and use of the high beams were factors that provided the sergeant with reasonable suspicion that Troka was driving while impaired, justifying a traffic stop. Most importantly for my grounds in resolving this appeal, the court’s statements included an implicit finding crediting the sergeant’s testimony that no vehicle’s high beams were directed at Troka’s vehicle when Troka flashed his high beams, for the second time, within 500 feet of the sergeant’s oncoming vehicle.

DISCUSSION

A. Probable Cause for the Stop

¶12 Our supreme court has summarized the controlling law as follows:

The temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of the Fourth Amendment.” An automobile stop must not be unreasonable under the circumstances. “‘A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred,’ or have grounds to reasonably suspect a violation has been or will be committed.”

State v. Popke, 2009 WI 37, ¶11, 317 Wis. 2d 118, 765 N.W.2d 569 (quoted sources omitted). Separately, in reviewing a circuit court’s suppression ruling, this court upholds the circuit court’s findings of historical fact unless they are clearly erroneous. *State v. Roberts*, 196 Wis. 2d 445, 452, 538 N.W.2d 825 (Ct. App. 1995).

¶13 At least in the heading of an argument section, Troka contends that the investigative stop here was unlawful because “intermittent flashing of bright-lights combined with a slow rate of speed were not sufficient evidence to support a finding of reasonable suspicion to stop [his] vehicle.” (Capitalization altered.) I need not address this argument, because I conclude that (1) the circuit court did not commit clear error in implicitly finding that no vehicle’s high beams were directed at Troka’s vehicle when he activated his high beams within 500 feet and in the direction of the sergeant’s vehicle, and (2) this conduct, known to the sergeant, violated WIS. STAT. § 347.12(1)(a).

¶14 Troka fails to provide a basis for me to conclude that the court’s finding regarding Troka’s second use of the high beams was clearly erroneous, or that the high beam statute does not apply here. I do not understand what argument he may intend to make on this topic in his principal brief, and he did not file a reply brief. In order to go further on this issue, this court would have to attempt to construct an argument in Troka’s favor, which is not permitted. Therefore, Troka fails to persuade us that the sergeant objectively lacked probable cause to believe that a traffic violation had occurred, justifying the traffic stop.

B. Reliance on an Unpublished Opinion

¶15 Troka argues that the circuit court erred in denying his motion for reconsideration by relying on an unpublished opinion, *State v. Sampson*,

No. 1979AP1510, unpublished slip op. (WI App Mar. 25, 1980), contrary to WIS. STAT. RULE 809.23, to support the court's decision that Troka had violated WIS. STAT. § 346.59(1) or (2). This argument fails for at least the reason that *Sampson* involved only the too-slow speed issue, which is not pertinent to the grounds for affirmance, given the discussion above.

CONCLUSION

¶16 For these reasons, I conclude that the circuit court was not clearly erroneous in finding that facts known to the sergeant objectively constituted a violation of WIS. STAT. § 347.12(1)(a) and for this reason the court did not err in denying Troka's motion to suppress evidence. Accordingly, I affirm the judgment of conviction.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

